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Minnesota Defamation Law and the Constitution: First Amendment Limitations on the Common Law Torts of Libel and Slander

NOTES

MINNESOTA DEFAMATION LAW AND THE CONSTITUTION: FIRST AMENDMENT LIMITATIONS ON THE COMMON LAW TORTS OF LIBEL AND SLANDER

Defamation law has undergone significant change since 1964, when the United States Supreme Court first held that the first amendment protects some defamatory statements. In subsequent decisions spanning more than a decade, the Court has clarified the first amendment limitations. But unresolved issues still confront state courts as they apply the first amendment limitations to a defamation action. This Note discusses the issues confronting Minnesota courts by setting forth a method for ascertaining the relevant first amendment limitations.

I. INTRODUCTION

The common law, with some statutory modification,[1] governed defamation actions until 1964. Defamation law—the law of libel and slander[2]—was usually a matter of strict liability. Liability was imposed for publication of a false and defamatory statement without regard to the intentions or even the negligence of the defendant,[3] unless the communication enjoyed a common law privilege.[4] The first amendment guarantees of free speech and press afforded no protection because it had long been established that the first amendment protected only truthful statements.[5]

In the 1964 case of *New York Times Co. v. Sullivan,*[6] however, the United States Supreme Court decided that the first amendment protects some defamatory falsehood, thus adding a constitutional dimen-

1. One statutory modification has given added protection to the media. Many states have retraction statutes which allow a newspaper to mitigate damages by publishing a retraction of the statement. *See, e.g.,* CAL. CIV. CODE § 48a (West 1954); KY. REV. STAT. § 411.051 (1972); MINN. STAT. § 548.06 (1976). Other states preclude defamation liability of a radio or television broadcaster unless the broadcaster has been negligent in failing to prevent the defamation. *See, e.g.,* IOWA CODE ANN. § 659.5 (West 1950) (radio broadcaster); MINN. STAT. § 544.043 (1976) (radio and television broadcasters). *See generally* Remmers, *Recent Legislative Trends in Defamation by Radio,* 64 HARV. L. REV. 727 (1951).

Another modification has limited liability for republication of a defamation. A number of states have enacted the UNIFORM SINGLE PUBLICATION ACT. *See, e.g.,* IDAHO CODE §§ 6-702 to -705 (Supp. 1976); N.M. STAT. ANN. §§ 40-27-30 to -34 (1953); PA. STAT. ANN. tit. 12, §§ 2090.1-.5 (1967).

2. The general distinction between libel and slander is that slander is an oral defamation and libel is a written defamation. Richmond v. Post, 69 Minn. 457, 459, 72 N.W. 704, 704 (1897). *Compare, e.g.,* McBride v. Sears, Roebuck & Co., ___ Minn. ___, ___, 235 N.W.2d 371, 372-73 (1975) (slander) *with, e.g.,* Gadach v. Benton County Co-op Ass'n, 236 Minn. 507, 509-10, 53 N.W.2d 230, 232 (1952) (libel).

3. *See* Note, *Publication of Inadvertent Defamatory Material,* 25 MINN. L. REV. 495 (1941); notes 13-31 *infra* and accompanying text.

4. *See* notes 55-69 *infra* and accompanying text.

5. *See* Beauharnais v. Illinois, 343 U.S. 250, 254-58 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (dictum). *See also* Roth v. United States, 354 U.S. 476, 483-85 (1957) (first amendment does not protect obscenity).

6. 376 U.S. 254 (1964). See notes 72-80 *infra* and accompanying text.

sion to defamation law. The Court in *New York Times* held that a public official cannot recover for defamation unless the defendant acted with actual malice—that is, with knowledge of falsity or with reckless disregard for the truth. Three years later, in *Curtis Publishing Co. v. Butts,*[7] the Court applied the *New York Times* actual malice requirement to defamation actions brought by "public figures." But in the 1974 case of *Gertz v. Robert Welch, Inc.,*[8] the Court held that the actual malice standard is not constitutionally required in defamation actions brought by private individuals. These and other decisions of the Court have helped define the constitutional dimension, but its precise limits remain unclear.

This Note will set forth a method for ascertaining how the first amendment limits Minnesota defamation actions.[9] A brief explanation of the common law of defamation[10] and the emerging constitutional limitations[11] will precede this discussion.

II. THE COMMON LAW OF DEFAMATION

Defamation is a common law cause of action which recognizes an individual's interest in protecting his reputation. The common law imposes liability for the unprivileged publication of a false and defamatory statement which injures the reputation of another.[12] Hence, a prima facie case is established by showing publication; a defamatory statement referring to the plaintiff; and, in certain circumstances, special damages. To avoid liability, the defendant must then prove the publication was true or privileged.

A. *Elements of a Prima Facie Case*

Publication, in the context of a defamation action, means an oral or written communication which is understood by a third party.[13] A picture,[14] a letter,[15] a statement in a foreign language,[16] a newspaper arti-

7. 388 U.S. 130 (1967). See notes 81-84 *infra* and accompanying text.

8. 418 U.S. 323 (1974). See notes 89-98 *infra* and accompanying text.

9. See notes 102-277 *infra* and accompanying text.

10. See notes 12-69 *infra* and accompanying text.

11. See notes 70-101 *infra* and accompanying text.

12. *E.g.,* Matthis v. Kennedy, 243 Minn. 219, 222-23, 67 N.W.2d 413, 416 (1954); RESTATEMENT (SECOND) OF TORTS §§ 558-559 (1977).

13. Larson v. Krostue, 110 Minn. 337, 125 N.W. 262 (1910); Glatz v. Thein, 47 Minn. 278, 50 N.W. 127 (1891); Petsch v. Dispatch Printing Co., 40 Minn. 291, 293-94, 41 N.W. 1034, 1035 (1889).

14. Burton v. Crowell Pub. Co., 82 F.2d 154, 154-56 (2d Cir. 1936); Louka v. Park Entertainments, Inc., 294 Mass. 268, 270-71, 1 N.E.2d 41, 42-43 (1936); Zbyszko v. New York Am., Inc., 228 App. Div. 277, 277-78, 239 N.Y.S. 411, 413 (1930).

15. *See* Brill v. Minnesota Mines, Inc., 200 Minn. 454, 274 N.W. 631 (1937); McLaughlin v. Quinn, 183 Minn. 568, 237 N.W. 598 (1931); Hansen v. Hansen, 126 Minn. 426, 148 N.W. 457 (1914).

cle,[17] and a radio or television broadcast[18] all can be means of publication. In Minnesota,[19] as in most states,[20] the defendant must negligently or intentionally communicate the statement to a third party. A defendant is not liable, for example, if a third party reads a defamatory letter sent to the plaintiff unless the defendant had reason to know the third party might read the letter.[21] In fact, publication was the only element at common law which was not a matter of strict liability.[22]

A statement is defamatory if it subjects the plaintiff to public hatred, contempt, or ridicule.[23] The meaning of the publication, not solely a literal reading, may establish the defamatory content.[24] The defamatory meaning may be apparent on the face of the statement or it may require reference to extrinsic facts.[25] This distinction results in different requirements of pleading and proof. If the defamatory meaning is apparent on the face of the statement, only the words themselves must be pleaded and proved to establish the defamation.[26] However, if extrinsic facts are needed to establish the defamatory meaning, they too must be pleaded and proved.[27]

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16. MacInnis v. National Herald Printing Co., 140 Minn. 171, 172-74, 167 N.W. 550, 550-51 (1918); Glatz v. Thein, 47 Minn. 278, 280, 50 N.W. 127, 128 (1891).

17. *See, e.g.*, Lydiard v. Daily News Co., 110 Minn. 140, 124 N.W. 985 (1910); Landon v. Watkins, 61 Minn. 137, 63 N.W. 615 (1895).

18. *See, e.g.*, Wanamaker v. Lewis, 173 F. Supp. 126 (D.D.C. 1959); American Broadcasting—Paramount Theatres, Inc. v. Simpson, 106 Ga. App. 230, 233, 126 S.E.2d 873, 876 (1962); Landau v. Columbia Broadcasting System, Inc., 205 Misc. 357, 359-60, 128 N.Y.S.2d 254, 257 (Sup. Ct. 1954), *aff'd mem.*, 1 App. Div. 2d 660, 147 N.Y.S.2d 687 (1955).

19. Olson v. Molland, 181 Minn. 364, 232 N.W. 625 (1930); Kramer v. Perkins, 102 Minn. 455, 456-59, 113 N.W. 1062, 1063-64 (1907).

20. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113, at 774-75 & nn.40-57 (4th ed. 1971).

21. *See* cases cited note 19 *supra*.

22. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113, at 772-76 (4th ed. 1971); Note, *supra* note 3, at 495.

23. *E.g.*, Morey v. Barnes, 212 Minn. 153, 156, 2 N.W.2d 829, 831 (1942); Cole v. Millspaugh, 111 Minn. 159, 126 N.W. 626 (1910).

24. In Tawney v. Simonson, Whitcomb & Hurley Co., 109 Minn. 341, 352, 124 N.W. 229, 233 (1909), the court said that "[t]he question is not whether [the] article can be divided into two parts, and each of those parts so analyzed separately from each other that each would appear to be free from defamatory meaning. The article must be construed as a whole." However, when determining the meaning, the court will not enlarge the sense of the words or give them an unnatural meaning. Jones v. Monico, 276 Minn. 371, 374, 150 N.W.2d 213, 215 (1967); Cleary v. Webster, 170 Minn. 420, 423, 212 N.W. 898, 899 (1927).

25. *E.g.*, Kervin v. News Tribune Co., 178 Minn. 61, 225 N.W. 906 (1929); Ten Broeck v. Journal Printing Co., 166 Minn. 173, 207 N.W. 497 (1926).

26. *E.g.*, Sharpe v. Larson, 70 Minn. 209, 211-12, 72 N.W. 961, 962 (1897), *rev'd second appeal on other grounds*, 74 Minn. 323, 77 N.W. 233 (1898); Fredrickson v. Johnson, 60 Minn. 337, 341, 62 N.W. 388, 389 (1895) (semble).

27. Ten Broeck v. Journal Printing Co., 166 Minn. 173, 175-76, 207 N.W. 497, 497-98

In addition to being defamatory, the communication must refer to the plaintiff.[28] The "colloquim" is the portion of the pleading which alleges that the defamatory statement refers to the plaintiff.[29] The defendant's intention or negligence in referring to the plaintiff is immaterial under the common law of most states.[30] In Minnesota, however, the defendant must intend to refer to the plaintiff.[31]

The common law of defamation recognizes three types of damages: special, general, and punitive. Special damages can be recovered by proving actual and special pecuniary loss.[32] A typical example is loss of employment caused by the defamation.[33] General damages are presumed, and are recoverable without proof of actual injury to reputation.[34] Included in general damages are harm to reputation, mental distress, humiliation, and embarrassment.[35] Punitive damages are designed to punish the defendant, not to compensate the plaintiff.[36]

Special damages can be recovered whenever proved, regardless of whether the action is predicated on slander or libel.[37] The plaintiff's ability to recover general damages, however, differs depending on whether the action is based on slander or libel.

If the action is based on slander, general damages are presumed if the

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(1926); Richmond v. Post, 69 Minn. 457, 72 N.W. 704 (1897); Newell v. How, 31 Minn. 235, 236-37, 17 N.W. 383, 383-84 (1883); Smith v. Coe, 22 Minn. 276 (1875).

28. Cady v. Minneapolis Times Co., 58 Minn. 329, 59 N.W. 1040 (1894); Stoll v. Houde, 34 Minn. 193, 25 N.W. 63 (1885).

29. *E.g.*, Lewis, *The Individual Member's Right to Recover For a Defamation Leveled at the Group*, 17 U. MIAMI L. REV. 519, 519-20 (1963) ("The question of the plaintiff's identity would theoretically be categorized under the colloquim; however, the trend toward greater liberalization in pleading and practice has more or less eliminated the use of the formal pleadings.").

30. *E.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113, at 771 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 580B, comment *b* (1977).

31. Clare v. Farrell, 70 F. Supp. 276 (D. Minn. 1947) (applying Minnesota law); Knox v. Meehan, 64 Minn. 280, 281-82, 66 N.W. 1149, 1149-50 (1896); Dressel v. Shipman, 57 Minn. 23, 58 N.W. 684 (1894).

32. *E.g.*, Erick Bowman Remedy Co. v. Jensen Salsbery Labs., Inc., 17 F.2d 255, 259 (8th Cir. 1926). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112, at 760-62 (4th ed. 1971). For a discussion of whether mental suffering should also be an element of special damages see Day, *Mental Suffering as an Element of Damages in Defamation Cases*, 15 CLEV.-MAR. L. REV. 26 (1966).

33. *See* Wilson v. Cotterman, 65 Md. 190, 3 A. 890 (1886); Lombard v. Lennox, 155 Mass. 70, 28 N.E. 1125 (1891).

34. *E.g.*, Froslee v. Lund's State Bank, 131 Minn. 435, 438-39, 155 N.W. 619, 620-21 (1915); Svendsen v. State Bank, 64 Minn. 40, 65 N.W. 1086 (1896).

35. *See, e.g.*, Thorson v. Albert Lea Pub. Co., 190 Minn. 200, 204-06, 251 N.W. 177, 179-80 (1933).

36. Loftsgaarden v. Reiling, 267 Minn. 181, 182 & n.2, 126 N.W.2d 154, 154-55 & n.2, *cert. denied*, 379 U.S. 845 (1964); Hammersten v. Reiling, 262 Minn. 200, 205-06, 115 N.W.2d 259, 265-66, *cert. denied*, 371 U.S. 862 (1962).

37. RESTATEMENT (SECOND) OF TORTS § 622, comment *a* (1977).

slander falls into one of the per se categories: imputation of business incompetency,[38] imputation of a crime,[39] imputation of unchastity to a woman,[40] or imputation of a loathsome disease.[41] If the slander does not fall into any of these categories, general damages are presumed only if the plaintiff satisfies the threshold requirement of proving special damages.[42]

The early common law presumed general damages if the action was based on libel.[43] This rule has been modified in many states by retraction statutes, which create an exception for defamatory statements published by newspapers.[44] Under the Minnesota retraction statute, only special damages are recoverable from a newspaper if no retraction was demanded or if the newspaper published the defamatory statement in a good faith belief of its accuracy.[45] A second modification made by some states, but apparently not Minnesota,[46] distinguishes libel per se from libel per quod.[47] A libel per quod is not defamatory on its face.[48] Damages are presumed from a libel per quod only if the plaintiff first proves

38. *E.g.*, Manion v. Jewel Tea Co., 135 Minn. 250, 252-53, 160 N.W. 767, 768 (1916); Beek v. Nelson, 126 Minn. 10, 147 N.W. 668 (1914).

39. *E.g.*, Yencho v. Kruly, 158 Minn. 408, 197 N.W. 752 (1924) (by implication); Burch v. Bernard, 107 Minn. 210, 211, 120 N.W. 33, 34 (1909).

40. In Minnesota, the cases generally state that only imputation of business incompetency or of a crime constitute slander per se. *See, e.g.*, Larson v. R.B. Wrigley Co., 183 Minn. 28, 29-30, 235 N.W. 393, 394 (1931); Beek v. Nelson, 126 Minn. 10, 147 N.W. 668 (1914). But in practice the imputation of unchastity to a woman was also recognized as slander per se. *See* Schendel v. Mundt, 153 Minn. 209, 210, 190 N.W. 56, 56 (1922); Ernster v. Eltgroth, 149 Minn. 39, 182 N.W. 709 (1921).

41. Apparently the Minnesota court has never had occasion to use the "loathsome disease" category. There is no question, however, that imputation of a loathsome disease is widely recognized as slander per se. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112, at 756-57 (4th ed. 1971).

42. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 575, comment *a* (1977). *See, e.g.*, Gaare v. Melbostad, 186 Minn. 96, 242 N.W. 466 (1932); Larson v. R.B. Wrigley Co., 183 Minn. 28, 235 N.W. 393 (1931).

43. *See* Larson v. R.B. Wrigley Co., 183 Minn. 28, 29, 235 N.W. 393, 394 (1931) (dictum); Pratt v. Pioneer-Press Co., 35 Minn. 251, 254-55, 28 N.W. 708, 709-10 (1886).

44. *See, e.g.*, CAL. CIV. CODE § 48a (West 1954); FLA. STAT. ANN. § 770.02 (West 1964 & Supp. 1977); KY. REV. STAT. § 441.051 (1972); MICH. COMP. LAWS ANN. § 600.2911 (West 1968).

45. MINN. STAT. § 548.06 (1976).

46. In cases where proof of extrinsic facts was necessary to prove the defamatory nature of the statement, the Minnesota court has not expressed any limitation on the recovery of damages. *See, e.g.*, cases cited note 27 *supra*.

47. *See* Ilitzky v. Goodman, 57 Ariz. 216, 220-22, 112 P.2d 860, 862 (1941); Karrigan v. Valentine, 184 Kan. 783, 339 P.2d 52 (1959); Flake v. Greensboro News Co., 212 N.C. 780, 785, 195 S.E. 55, 59 (1938); Ellsworth v. Martindale-Hubbell Law Directory, Inc., 66 N.D. 578, 587-88, 268 N.W. 400, 405 (1936), *aff'd second appeal*, 68 N.D. 425, 280 N.W. 879 (1938), *aff'd third appeal*, 69 N.D. 610, 289 N.W. 101 (1939); Moore v. P.W. Pub. Co., 3 Ohio St. 2d 183, 187-90, 209 N.E.2d 412, 415 (1965), *cert. denied*, 382 U.S. 978 (1966).

48. *See* cases cited note 47 *supra*.

special damage, or if the libel falls into one of the slander per se categories.[49]

If the plaintiff seeks punitive damages, he must prove common law malice,[50] which consists of ill will or bad faith.[51] In Minnesota, punitive damages are recoverable even in the absence of actual damages.[52]

B. Defenses

The truth of the statement or a privilege to publish it provide the two major defenses to an action for defamation. Under the common law, the falsity of a defamatory publication was presumed.[53] The burden of proving the truth of the statement, therefore, was on the defendant.[54] To raise the defense of a common law privilege, a defendant must show that he has an interest to be upheld, has acted in good faith, and has made the statement on the proper occasion, for the proper purpose, and to the proper parties.[55] The common law recognizes two kinds of privilege—absolute and qualified.

Absolute privileges render the defamatory words not actionable even though the words were intentionally false and malicious.[56] Statements to which Minnesota common law extends an absolute privilege include those made in the course of legislative and judicial proceedings.[57]

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49. Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 843-44 (1960). The RESTATEMENT (SECOND) OF TORTS § 569, comment *c* (1977) disapproves of the libel per quod rule. However, this section was adopted after considerable debate. Two of the contributors to the *Restatement*, William Prosser and Laurence Eldredge, had taken opposite positions on libel per quod for years in law review articles. *See* Eldredge, *Variation on Libel Per Quod*, 25 VAND. L. REV. 79 (1972); Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966); Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966); Prosser, *Libel Per Quod*, 46 VA. L. REV. 839 (1960).

50. *E.g.*, Hammersten v. Reiling, 262 Minn. 200, 209, 115 N.W.2d 259, 265-66, *cert. denied*, 371 U.S. 862 (1962); MacInnis v. National Herald Printing Co., 140 Minn. 171, 175, 167 N.W. 550, 551 (1918).

51. *E.g.*, McBride v. Sears, Roebuck & Co., ___ Minn. ___, ___, 235 N.W.2d 371, 375 (1975); Otto v. Charles T. Miller Hosp., 262 Minn. 408, 414, 115 N.W.2d 36, 40 (1962); Hebner v. Great Northern Ry., 78 Minn. 289, 292, 80 N.W. 1128, 1129 (1899).

52. Loftsgaarden v. Reiling, 267 Minn. 181, 126 N.W.2d 154, *cert. denied*, 379 U.S. 845 (1964), *noted in* 49 MINN. L. REV. 137 (1964) and 40 N.D.L. REV. 334 (1964).

53. *E.g.*, Wilcox v. Moore, 69 Minn. 49, 52, 71 N.W. 917, 918-19 (1897); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 116, at 798 (4th ed. 1971).

54. *See, e.g.*, Thompson v. Pioneer-Press Co., 37 Minn. 285, 294, 33 N.W. 856, 861-62 (1887); Palmer v. Smith, 21 Minn. 419, 420-21 (1875).

55. *E.g.*, McBride v. Sears, Roebuck & Co., ___ Minn. ___, ___, 235 N.W.2d 371, 374 (1975); *see* Burch v. Bernard, 107 Minn. 210, 212, 120 N.W. 33, 34 (1909); Landon v. Watkins, 61 Minn. 137, 144, 63 N.W. 615, 617-18 (1895).

56. *E.g.*, Matthis v. Kennedy, 243 Minn. 219, 223, 67 N.W.2d 413, 416 (1954). *See generally* Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463 (1909).

57. *E.g.*, Jenson v. Olson, 273 Minn. 390, 141 N.W.2d 488 (1966) (defamatory statement made during a civil service hearing; hearing "quasi-judicial"); Rolfe v. Noyes Bros. &

Qualified privileges, on the other hand, serve only to rebut the presumption of common law malice that is raised once the plaintiff has proven a prima facie case.[58] These privileges, therefore, impose a burden upon the plaintiff to prove common law malice.[59] Common law malice, as distinguished from *New York Times* actual malice,[60] can be proven by showing the defendant's bad faith, ill will, or spite.[61] Statements to which the Minnesota common law extends a qualified privilege include fair comment on the conduct of public officials,[62] fair and accurate reports of official proceedings,[63] statements made in the public interest,[64] and statements made about the character of employees.[65]

The common law privileges developed because of a need to protect

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Cutler, Inc., 157 Minn. 443, 196 N.W. 481 (1923) (defamatory statement appearing in lawsuit complaint); Peterson v. Steenerson, 113 Minn. 87, 89, 129 N.W. 147, 147 (1910) (dictum) (defamatory statement in legislative proceeding). *But see* Jones v. Monico, 276 Minn. 371, 374-76, 150 N.W.2d 213, 215-16 (1967) (per curiam) (defamatory statements made during proceedings of local legislative bodies are afforded only a qualified privilege).

One limitation on the privilege is that the words must be pertinent to the matter in issue. Matthis v. Kennedy, 243 Minn. 219, 224-29, 67 N.W.2d 413, 417-20 (1954); Dodge v. Gilman, 122 Minn. 177, 178-79, 142 N.W. 147, 148 (1913).

For other instances of absolute privilege see RESTATEMENT (SECOND) OF TORTS §§ 585-592A (1977).

58. *E.g.*, McBride v. Sears, Roebuck & Co., ___ Minn. ___, ___, 235 N.W.2d 371, 374 (1975) (quoting Hebner v. Great Northern Ry., 78 Minn. 289, 292, 80 N.W. 1128, 1129 (1899)); Hansen v. Hansen, 126 Minn. 426, 427, 148 N.W. 457, 457 (1914).

59. Hammersten v. Reiling, 262 Minn. 200, 207, 115 N.W.2d 259, 264, *cert. denied*, 371 U.S. 862 (1962); Clancy v. Daily News Corp., 202 Minn. 1, 8-10, 277 N.W. 264, 268-69 (1938); Peterson v. Steenerson, 113 Minn. 87, 90, 129 N.W. 147, 148 (1910).

60. See notes 72-80 *infra* and accompanying text.

61. Common-law malice can be shown by evidence that the defendant knew the statement was false, Friedell v. Blakely Printing Co., 163 Minn. 226, 231, 203 N.W. 974, 976 (1925) (dictum); Froslee v. Lund's State Bank, 131 Minn. 435, 438, 155 N.W. 619, 620 (1915), that the defendant lacked a good faith belief of truth, Quinn v. Scott, 22 Minn. 456, 462 (1876), that the defendant acted in reckless disregard of the truth, MacInnis v. National Herald Printing Co., 140 Minn. 171, 175, 167 N.W. 550, 551 (1918), that the defendant acted out of ill will or an improper motive, McKenzie v. Wm. J. Burns Int'l Detective Agency, Inc., 149 Minn. 311, 312, 183 N.W. 516, 517 (1921); Hansen v. Hansen, 126 Minn. 426, 427-28, 148 N.W. 457, 457-58 (1914), or that the defendant republished the defamation, Friedell v. Blakely Printing Co., 163 Minn. 226, 231, 203 N.W. 974, 976 (1925) (dictum); Gribble v. Pioneer Press Co., 34 Minn. 342, 25 N.W. 710 (1885).

62. *E.g.*, Clancy v. Daily News Corp., 202 Minn. 1, 8, 277 N.W. 264, 268 (1938); Friedell v. Blakely Printing Co., 163 Minn. 226, 230-31, 203 N.W. 974, 975-76 (1925); Fullerton v. Thompson, 123 Minn. 136, 143-44, 143 N.W. 260, 262-63 (1913).

63. *E.g.*, Hurley v. Northwest Pub., Inc., 273 F. Supp. 967, 970-72 (D. Minn. 1967), *aff'd*, 398 F.2d 346 (8th Cir. 1968) (per curiam); Nixon v. Dispatch Printing Co., 101 Minn. 309, 112 N.W. 258 (1907).

64. *E.g.*, Burch v. Bernard, 107 Minn. 210, 211-12, 120 N.W. 33, 34 (1909); *see* Mallory v. Pioneer-Press Co., 34 Minn. 521, 522-23, 26 N.W. 904, 905 (1886).

65. *See, e.g.*, McBride v. Sears, Roebuck & Co., ___ Minn. ___, ___, 235 N.W.2d 371, 374 (1975); Otto v. Charles T. Miller Hosp., 262 Minn. 408, 115 N.W.2d 36 (1962).

important interests through open discussion.[66] The fair comment privilege, for example, developed to protect healthy criticism of public officials.[67] But only a few states, including Minnesota, extended the privilege of fair comment to false statements of fact.[68] In those states where the privilege was limited to criticism based on true facts,[69] a newspaper criticized public officials at its own peril. Because this risk placed an intolerable burden on first amendment freedoms, the United States Supreme Court in 1964 intervened. For the first time, the law of defamation took on a constitutional dimension.

III. CONSTITUTIONAL PROTECTION—EMERGING CONCEPTS

Before 1964, defamatory statements were held to be unworthy of constitutional protection.[70] First amendment interests, the United States Supreme Court had said, were not advanced by falsehoods.[71] Recognizing, however, that an absolute duty of publishing truth had a chilling effect on first amendment freedoms, the Court in 1964 began a course of decisions that brought defamatory falsehoods within the ambit of the first amendment.

In the 1964 case of *New York Times Co. v. Sullivan,*[72] a police commissioner of Montgomery, Alabama, brought an action for defamation against the *New York Times* newspaper, alleging he had been defamed by a political advertisement that misstated his dealings with civil rights demonstrators. In Alabama, the common law privilege of fair comment applied only if criticism of a public official was true. Because some of the statements in the advertisement were inaccurate, an Alabama jury returned a verdict for the plaintiff. The Alabama Supreme Court affirmed.[73] The United States Supreme Court reversed, reasoning that the right to criticize the government and government officials is central to

66. *See* Harper, *Privileged Defamation,* 22 VA. L. REV. 642, 642-49 (1936); Comment, *Defamation—Absolute Immunity,* 15 OHIO ST. L.J. 330, 331 (1954). *See generally* Veeder, *Freedom of Public Discussion,* 23 HARV. L. REV. 413 (1910).

67. *See, e.g.,* Hammersten v. Reiling, 262 Minn. 200, 207, 115 N.W.2d 259, 264, *cert. denied,* 371 U.S. 862 (1962); Herringer v. Ingberg, 91 Minn. 71, 76-77, 97 N.W. 460, 463 (1903); Wilcox v. Moore, 69 Minn. 49, 52, 71 N.W. 917, 918 (1897).

68. *See* Noel, *Defamation of Public Officers and Candidates,* 49 COLUM. L. REV. 875, 896-97 & n.103 (1949) (nine states extend the privilege of fair comment to misstatements of fact; 26 states do not extend the privilege of fair comment to misstatements of fact).

69. *See* Noel, *supra* note 68, at 896 n.102.

70. *See* Beauharnais v. Illinois, 343 U.S. 250, 254-63 (1952) (state statute for criminal libel does not violate freedom of speech and press applicable to the states by the due process clause of the fourteenth amendment). *See generally* Note, *Constitutionality of the Law of Criminal Libel,* 52 COLUM. L. REV. 521 (1952).

71. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

72. 376 U.S. 254 (1964).

73. *See* New York Times Co. v. Sullivan, 273 Ala. 656, 144 So. 2d 25 (1962).

the first amendment.[74] The right to criticize, the Court said, includes the right to make "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[75] Moreover, it is realistic to expect that open and vigorous debate on public issues will, at times, result in error.[76] To protect open and robust debate, therefore, the first amendment must also protect some falsity.[77]

The Court did not, however, grant absolute protection to falsity. Rather, it held that a state cannot impose liability for the defamation of a public official unless the public official proves the falsehood was published with "actual malice."[78] Actual malice requires a showing by clear and convincing evidence[79] that the "defendant knew the statement was false or acted in reckless disregard of the truth."[80] *New York Times* thus represents the first major step in affording first amendment protection to the publication of defamatory statements.

New York Times involved a public official. The second important development occurred in *Curtis Publishing Co. v. Butts,*[81] when the Court applied the actual malice standard to defamation actions brought by "public figure" plaintiffs. The Court reasoned that these plaintiffs, either because of their status alone or because of their involvement in a public controversy,[82] command such public interest that discussion of their activity is analogous to the discussion and criticism of government

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74. 376 U.S. at 273.

75. *Id.* at 270.

76. *Id.* at 271.

77. *Id.* at 271-72. The first amendment concern of providing latitude for the speaker is frequently used as the rationale in decisions protecting speech. A speaker who must guess at the bounds of proscribed speech will censor his own speech to avoid liability. Vague statutes are often struck down on this basis. *See, e.g.,* Hynes v. Mayor and Council of Oradell, 96 S. Ct. 1755, 1760-62 (1976) (ordinance requiring notice of intent to solicit for a "recognized charitable cause"); Baggett v. Bullitt, 377 U.S. 360, 366-70 (1964) (statute prohibiting state employment of "subversives").

78. 376 U.S. at 283.

79. *Id.* at 285-86.

80. *Id.* at 279-80.

81. 388 U.S. 130 (1967). The Court consolidated two lower court cases, Curtis Pub. Co. v. Butts, 351 F.2d 702 (5th Cir. 1965) and Associated Press v. Walker, 393 S.W.2d 671 (Tex. Ct. Civ. App. 1965), to consider the impact of *New York Times* on defamation cases involving public figures.

82. One of the plaintiffs, Butts, was athletic director at the University of Georgia. The defamation suit was based on an article published in *The Saturday Evening Post* which accused him of conspiracy to fix a football game. The Court found that Butts may have achieved the status of public figure by notoriety alone. 388 U.S. at 155. In contrast, the other plaintiff, Walker, was a retired army general who had left the military to engage in political activity. The defamation suit was based on an Associated Press news dispatch which stated that Walker had led a violent crowd in opposition to federal marshals who were enforcing a court order to enroll a black student at the University of Mississippi. The Court found that Walker had achieved public figure status by thrusting himself into the vortex of an important public controversy. *Id.*

itself.[83] A majority of the Court, therefore, held that public figures must also prove actual malice.[84]

A divided Court extended the first amendment protection even further in *Rosenbloom v. Metromedia, Inc.*,[85] a 1971 decision. Rosenbloom was a private individual arrested for selling allegedly obscene literature. The defendant radio station reported that Rosenbloom had been arrested for selling obscene literature, failing to state that the literature was only alleged to be obscene. After his acquittal on the obscenity charge, Rosenbloom brought an action against the radio station for defamation. The court of appeals reversed a judgment for the plaintiff, holding that a showing of actual malice was required because the report involved a matter of public interest.[86] When the case came before the United States Supreme Court, eight justices filed five opinions. The plurality opinion, written by Justice Brennan, agreed with the court of appeals. Reasoning that the presence of first amendment protections is determined by examining the nature of the event, not the status of the participant,[87] the plurality held that a private individual defamed in the discussion of a public issue must prove actual malice to recover.[88]

In the 1974 decision of *Gertz v. Robert Welch, Inc.*,[89] the Court again considered the question of first amendment protection in a defamation action brought by a private individual. By then the composition of the Court had changed,[90] and a majority decided that *Rosenbloom* had set out an unworkable standard and unfair rule which encroached too far on state libel law.[91] The interest in open debate was not served adequately by *Rosenbloom* because media defendants continued to be subject to strict liability if the defamation did not relate to a matter of

83. *Id.* at 163-65 (Warren, C.J., concurring).

84. The Court split on the degree of protection to be afforded in public figure cases. Justice Harlan, who wrote the opinion for the Court, set out a negligence standard instead of an actual malice standard. *Id.* at 155. He reasoned that public figure cases do not present a situation analogous to public official cases and therefore ordinary tort rules should govern. *Id.* at 152-55. But a majority of the Court agreed with Chief Justice Warren's use of an actual malice standard. Chief Justice Warren reasoned that the rationale of *New York Times* was applicable because public figures, like public officials, have both an influential role in society and access to the media. *Id.* at 164.

85. 403 U.S. 29 (1971).

86. Rosenbloom v. Metromedia, Inc., 415 F.2d 892, 896 (3d Cir. 1969).

87. 403 U.S. at 43.

88. *Id.* at 52.

89. 418 U.S. 323 (1974).

90. Justices Harlan and Black had left the bench between the two decisions. Justices Powell and Rehnquist had joined the Court. Together with Justices Marshall and Stewart, who had dissented in *Rosenbloom*, Justices Powell and Rehnquist agreed on the question of first amendment protection. Justice Blackmun concurred, explaining that his shift in position from *Rosenbloom* was designed to provide solidarity in an area where the Court had been "sadly fractionated." *Id.* at 354.

91. *Id.* at 345-48.

public interest.[92] Nor was the interest in redressing injury to reputation served adequately, because deserving private plaintiffs often could not meet the burden of proving actual malice.[93] The Court concluded, therefore, that the states may disregard the *Rosenbloom* requirements of determining whether a public issue is involved and of proving actual malice. Instead, the states may condition liability upon any standard of fault in defamation actions brought by private individuals.[94] Strict liability, however, may not be imposed,[95] and neither presumed nor punitive damages are recoverable unless the private plaintiff proves actual malice.[96] Furthermore, public officials and public figures must still prove actual malice because they have access to the media to reply and have assumed the risk of adverse comment.[97]

Gertz, then, marks a change in emphasis from the interest in protecting the discussion of public issues to the interest in vindicating private reputation. To provide greater protection to private individuals, the states should be allowed "substantial latitude in their efforts to enforce a legal remedy for defamatory falsehoods injurious to the reputation of a private individual."[98]

The Court reinforced this shift in emphasis in *Time, Inc. v. Firestone,*[99] a 1976 case involving a misreport of the decree in the plaintiff's divorce litigation. The Court held that the plaintiff could not be deemed a public figure because the *Butts* requirement of involvement in a public controversy was not met. Divorce litigation, the Court said, is a private, not a public, controversy.[100] The Court also refused to extend special protection to false reports of judicial proceedings because the creation of such a subject matter category would amount to a reinstatement of *Rosenbloom.*[101]

From *New York Times* through *Firestone,* the Court's decisions on first amendment limitations on defamation actions have had a profound effect on state defamation law. Whenever the first amendment applies, it precludes the imposition of strict liability for defamation. Some room is left for the states to adopt their own standards of liability in private individual actions, however. And although the Court's decisions since *New York Times* have answered some questions about the application of first amendment protection, other questions remain. Minnesota's re-

92. *Id.* at 346.
93. *Id.*
94. *Id.* at 347.
95. *Id.*
96. *Id.* at 348-50.
97. *Id.* at 345.
98. *Id.* at 345-46.
99. 96 S. Ct. 958 (1976).
100. *Id.* at 965-66.
101. *Id.* at 966-67.

sponse to these alternatives and unanswered questions is the next subject of consideration.

IV. First Amendment Limitations on the Minnesota Common Law of Defamation

Ascertaining the precise effects of the first amendment on a defamation action involves a three-step process. First, it must be decided whether the first amendment protections even apply. In the case of a defamation action against a media defendant, the protections clearly are in force. In other cases, the decision hinges on the resolution of two major issues: one, whether the first amendment protects non-media as well as media defendants;[102] and two, whether it protects non-media slanders.[103]

If the protections do apply, the next step is to determine which set of requirements limit the action—those of *New York Times, Butts,* or *Gertz.*[104] This question is resolved by making a simultaneous inquiry into the status of the plaintiff and the content of the statement.

The final step is to apply the appropriate set of constitutional requirements.[105]

A. Determining Whether the First Amendment Limitations Apply—Protection of Non-Media Defendants and Slanders

The issue of whether the first amendment protections extend to non-media defendants arises because the Court has never been confronted with a defamation action in which the statement was published by a means other than the media. The holdings and rationale in the Court's decisions, therefore, are phrased in terms of newspapers and broadcasters.[106] Several of the decisions, however, support a conclusion that the first amendment protections apply to non-media defendants. In *Garrison v. Louisiana*[107] and *Henry v. Collins,*[108] the Court afforded first amendment protection to non-media defendants who issued defamatory press releases. In *St. Amant v. Thompson,*[109] the Court gave first amend-

102. See notes 106-17 *infra* and accompanying text.

103. See notes 118-19 *infra* and accompanying text.

104. See notes 120-65 *infra* and accompanying text.

105. See notes 166-277 *infra* and accompanying text.

106. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 332 (1974) (Court stated first amendment issue in context of protection afforded to "a newspaper or broadcaster"); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971) (holding phrased in terms of a "licensed radio station"); Curtis Pub. Co. v. Butts, 388 U.S. 130, 155 (1967) (public figure must prove defendant's extreme departure from standards of "investigating and reporting").

107. 379 U.S. 64 (1964).

108. 380 U.S. 356 (1965) (per curiam).

109. 390 U.S. 727 (1968).

ment protection to a political candidate who made a defamatory speech over television.

Some state and federal courts have applied the same constitutional protection both to the press and to non-media speakers.[110] This is the approach favored by the *Restatement.*[111] In Minnesota, media defendants fare slightly better than non-media defendants because of the Minnesota retraction[112] and broadcaster[113] statutes. The Minnesota decision of *Beatty v. Ellings,*[114] however, indicates that the Minnesota court will apply the first amendment protection in defamation actions against non-media as well as media defendants.[115] That case involved an action brought by a public figure for slanders made by several non-media individuals during the course of three public meetings. Although the court had ample common law grounds for deciding the case,[116] it used a first amendment basis.[117] More recently, the court applied the *New York Times* actual malice standard in *Hirman v. Rogers,*[117.1] a case involving non-media defendants who had used the media to publish the allegedly defamatory statements. The court held that the defendant's motion to dismiss should have been granted because the evidence on the issue of actual malice was insufficient as a matter of law.[117.2]

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110. *See* Davis v. Schuchat, 510 F.2d 731, 733-34 (D.C. Cir. 1975); Ammond v. McGahn, 390 F. Supp. 655, 660-61 (D.N.J. 1975) (dictum), *rev'd on other grounds,* 532 F.2d 325 (3d Cir. 1976); Williams v. Trust Co., ___ Ga. App. ___, ___, 230 S.E.2d 45, 47-48 (1976); Jacron Sales Co. v. Sindorf, 276 Md. 580, 590-94, 350 A.2d 688, 694-96 (1976); Cera v. Mulligan, 79 Misc. 2d 400, 358 N.Y.S.2d 642 (Sup. Ct. 1974); Cline v. Brown, 24 N.C. App. 209, 210 S.E.2d 446 (1974), *cert. denied,* 286 N.C. 412, 211 S.E.2d 793 (1975).

111. RESTATEMENT (SECOND) OF TORTS § 580B, comment *d* (1977) takes the position that it is anomalous to impose strict liability on an ordinary citizen for making a defamatory statement to a neighbor while holding a newspaper publisher, who has published the same words to a much larger audience, liable only upon a showing of fault. For the argument that the Court should afford the press greater protection than other speakers see Nimmer, *Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?,* 26 HASTINGS L.J. 639 (1975).

112. MINN. STAT. § 548.06 (1976).

113. MINN. STAT. § 544.043 (1976) precludes liability against a television or radio station for a defamatory broadcast, made by someone other than an agent or employee of the station, which could not have been reasonably prevented.

114. 285 Minn. 293, 173 N.W.2d 12 (1969), *cert. denied,* 398 U.S. 904 (1970).

115. *See also* Lydiard v. Wingate, 131 Minn. 355, 155 N.W. 212 (1915) (implication that the common law privilege of fair comment extends equally to citizens and newspapers); Herringer v. Ingberg, 91 Minn. 71, 76-77, 97 N.W. 460, 463 (1903) (same).

116. The court could have disposed of the case solely on the grounds that the defendants' statement were not defamatory, 285 Minn. at 300, 173 N.W.2d at 16-17, or that the words were not actionable in the absence of special damage, *id.* at 300-01, 173 N.W.2d at 17. The court also considered a common law privilege attaching to public proceedings, but found it unnecessary to use the privilege in its decision because of "the seemingly more sweeping constitutional privilege." *Id.* at 302 n.13, 173 N.W.2d at 18 n.13.

117. *Id.* at 301-02, 173 N.W.2d at 17-18.

117.1. No. 46760 (Minn. Aug. 12, 1977).

117.2. *Id.*, Slip op. at 8.

The *Beatty* decision also indicates that the Minnesota court will apply the first amendment requirements to non-media slanders. Because the United States Supreme Court has never addressed the issue of whether the first amendment protects non-media slanders, it is conceivable that a state could impose the first amendment requirements in actions for libels and media slanders while not imposing such requirements for non-media slanders.[118] *Beatty,* however, indicates that the Minnesota court will impose the first amendment requirements in actions for non-media slanders, because the court held that the public figure plaintiff could not recover for slanders spoken by several individuals unless there was proof of actual malice.[119]

B. *Determining Whether the Requirements of* New York Times, Butts, *or* Gertz *Apply to the Defamation Action*

The defamation decisions of the United States Supreme Court have created two sets of first amendment requirements. One set, derived from *New York Times*[120] and *Butts,*[121] applies to public officials and public figures, respectively. The second set of requirements, set forth in *Gertz,*[122] applies to private individuals. To determine which set of requirements apply, the initial inquiry is into the public or private status of the plaintiff. But the inquiry cannot end here, because some defamatory statements may have no relationship whatever to the public status of a plaintiff. A simultaneous inquiry must be made, therefore, into the content of the statement and its relationship to the status of the plaintiff.

1. *Public Officials and Public Figures*

At the very least, public officials include those individuals "in the hierarchy of government employees who have or appear to have substantial responsibility for, or control over the conduct of governmental affairs."[123] More useful than a definition of public official, however, is a survey of the case law which has applied the actual malice standard to cases involving specific officials. From the outset it was clear that the public official category did not refer solely to high government officials: the plaintiff in *New York Times* was a commissioner at the municipal

118. *See* Jacron Sales Co. v. Sindorf, 276 Md. 580, 590-94, 350 A.2d 688, 694-96 (1976); RESTATEMENT (SECOND) OF TORTS § 580B, comment *d* (1977).

119. 285 Minn. at 301-02, 173 N.W.2d at 17-18.

120. *See* notes 72-80 *supra* and accompanying text.

121. *See* notes 81-84 *supra* and accompanying text.

122. *See* notes 89-98 *supra* and accompanying text.

123. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). *See generally* Comment, *Defamation of a Public Official: The* New York Times *Case in Perspective,* 15 DE PAUL L. REV. 376, 388-96 (1966) (meaning of "public official").

level.[124] The Court has since required the actual malice standard in cases involving elected municipal judges,[125] a county attorney,[126] candidates for public office,[127] chiefs of police,[128] a park supervisor,[129] and a deputy sheriff.[130]

The Minnesota Supreme Court has treated the plaintiffs as public officials in three cases. In *Mahnke v. Northwest Publications, Inc.*,[131] the court applied the actual malice standard in a defamation action brought by a police detective. The defamatory statements about the detective appeared in a newspaper account of a criminal complaint the detective was investigating. The second case, *Standke v. B.E. Darby & Sons*,[132] involved newspaper criticism of a grand jury investigation. The court held that the plaintiff grand juror was a public official, but it did so reluctantly because a grand juror neither seeks his position nor has easy access to the media for reply.[133] The court felt compelled, however, to view the grand juror as a public official in light of the governmental nature of grand jury proceedings.[134] Finally, in *Hirman v. Rogers*,[134.1] the parties had agreed that the plaintiffs, two police officers and a deputy sheriff, were public officials. The court held, therefore, that in the absence of any evidence of *New York Times* actual malice, a motion to dismiss should have been granted by the trial court.[134.2]

Even if the plaintiff is a public official, the actual malice standard applies only if the statement relates to official conduct of any kind[135] or to private conduct which touches the official's fitness for public office.[136] If the statement does not have this relationship, presumably the *Gertz* requirements apply.[137]

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124. New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).

125. Garrison v. Louisiana, 379 U.S. 64 (1964).

126. Henry v. Collins, 380 U.S. 356 (1965) (per curiam).

127. Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).

128. Time, Inc. v. Pape, 401 U.S. 279 (1971); Henry v. Collins, 380 U.S. 356 (1965). *See also* Jackson v. Filliben, 281 A.2d 604 (Del. Super. 1971) (police sergeant is a public official); Coursey v. Greater Niles Township Pub. Corp., 40 Ill. 2d 257, 264-65, 239 N.E.2d 837, 841 (1968) (lowest ranking patrolman is a public official).

129. Rosenblatt v. Baer, 383 U.S. 75 (1966).

130. St. Amant v. Thompson, 390 U.S. 727 (1968).

131. 280 Minn. 328, 160 N.W.2d 1 (1968).

132. 291 Minn. 468, 193 N.W.2d 139 (1971), *cert. dismissed*, 406 U.S. 902 (1972).

133. *Id.* at 471-72, 193 N.W.2d at 142-43.

134. *Id.* at 473-74, 193 N.W.2d at 143-44.

134.1. No. 46760 (Minn. Aug. 12, 1977).

134.2. *Id.*, Slip op. at 7-8.

135. *See* Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

136. Garrison v. Louisiana, 379 U.S. 64, 76-77 (1964).

137. In Rosenblatt v. Baer, 383 U.S. 75, 85-86 (1966), the Court said:

> The motivating force for the decision in *New York Times* was twofold. . . . There is, first, a strong interest in debate on public issues, and, second, a strong

In deciding who is a public figure, the Court in *Gertz* indicated that persons become public figures in one of two ways. Either they "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes" or they "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[138] The former are general public figures whereas the latter are public figures for limited purposes and for a limited number of issues. This "limited" public figure category includes both those individuals who are involuntarily "drawn into" as well as those who voluntarily thrust themselves into the forefront of a particular controversy.[139] To determine whether a person is a limited public figure, the Court has said that the most useful approach is to examine "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."[140]

Prior to *Gertz*, the public figure category seemed to encompass a great number of individuals.[141] But in *Gertz* and *Firestone* the Court made it clear that the category is in fact rather narrow. Although the plaintiff

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interest in debate about those persons who are in a position significantly to influence the resolution of those issues. . . . Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present and the *New York Times* malice standards apply.

If a statement relates to a purely personal matter which has no bearing on the official's fitness for office, neither of the two motivating factors for the *New York Times* decision is present. The statement, therefore, relates to the official in his status as a private citizen and *Gertz* rather than *New York Times* should be applied. *See* RESTATEMENT (SECOND) OF TORTS § 580B, comment *a* (1977); Note, *Extension of Sullivan's Actual Malice Standard to Defamation of Public Figures*, 2 GA. L. REV. 393, 414-16 (1968).

It is conceded, however, that as a practical matter most statements about a public official will be protected by the actual malice standard because even personal attributes such as "dishonesty, malfeasance, or improper motivation" bear a relationship to the public official's fitness for office. Garrison v. Louisiana, 379 U.S. 64, 77 (1964). *See* Note, *Recent Developments Concerning Constitutional Limitations on State Defamation Laws*, 18 VAND. L. REV. 1429, 1446 (1965).

138. 418 U.S. at 345 (1974).

139. Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." *Id.* at 345.

140. *Id.* at 352.

141. *E.g.*, Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199, 221-22 (1976). One reason why the public figure category seemed so broad was the Court's failure to define it more precisely in Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967). Comment, *Libel of the Public Figure: An Unsettled Controversy*, 12 ST. LOUIS L.J. 103, 116-18 (1967); Comment, *Libel and Public Figures: Extension of the Rule of* New York Times Co. v. Sullivan, 36 U.M.K.C. L. REV. 132, 149-50 (1968).

in *Gertz* was a prominent Chicago lawyer, the author of books and legal articles, and an officer in civic and professional organizations,[142] the Court held that he was not a public figure.[143] Applying the test for general public figures, the Court found no clear evidence of "general fame or notoriety in the community" or "pervasive involvement in the affairs of society."[144] Applying the test for limited public figures, the Court found that the plaintiff played either a minimal role or no role at all in the controversies giving rise to the defamation.[145]

The plaintiff in *Firestone* was the wife of Russell Firestone, heir to the tire fortune.[146] She was also a prominent figure in Palm Beach society.[147] The Court said that these factors were insufficient to make her a general public figure.[148] The Court also said that the defamatory statement about her divorce, described as a "cause célèbre,"[149] did not involve a "public controversy" within the meaning of *Gertz,* even though many members of the public were curious about her divorce.[150] The plaintiff, therefore, was not a limited public figure.

Four Minnesota cases have dealt with the issue of whether the plaintiff was a public figure. *Rose v. Koch*[151] involved a defamation action brought by Arnold Rose, an ex-legislator, sociology professor, and author of many scholarly works, including *An American Dilemma.* Using the language of *Butts,* which defines public figures as persons who thrust themselves into public controversies and have access to the media for rebuttal, the court held that Rose was a public figure.[152] His position as a professor and respected figure in the field of sociology, as well as his demonstrated access to the press, were sufficient to satisfy the *Butts* test.

The second and third cases involved the same plaintiff. In *Beatty v. Ellings*[153] and *Beatty v. Republican Herald Publishing Co.,*[154] the plaintiff was an attorney who alleged that he had been defamed by various public officials and a newspaper during his vigorous campaign of opposition to urban renewal and redevelopment programs in Winona, Minnesota. Quoting *Butts,* the court found that the plaintiff had become a

142. 418 U.S. at 351.
143. *Id.* at 352.
144. *Id.*
145. *Id.*
146. 96 S. Ct. at 963.
147. *Id.* at 963.
148. *Id.*
149. This description was used by the Florida Supreme Court. *Id.*
150. *Id.*
151. 278 Minn. 235, 154 N.W.2d 409 (1967).
152. *Id.* at 256-61, 154 N.W.2d at 424-26.
153. 285 Minn. 293, 173 N.W.2d 12 (1969), *cert. denied,* 398 U.S. 904 (1970).
154. 291 Minn. 34, 189 N.W.2d 182 (1971).

public figure through the "thrusting of his personality into the 'vortex' of an important public controversy."[155]

Finally, in *Standke v. B.E. Darby & Sons,*[156] the court held that the grand jurors are either public officials by virtue of their position, or public figures by virtue of their activity. The court relied on *Time, Inc. v.Hill*[157] and *Rosenbloom v. Metromedia, Inc.*[158] for the proposition that a person may become an involuntary public figure when placed in a position where the public interest demands free criticism.[159]

When the Court in *Gertz* determined that the plaintiff was not a public figure, it clarified the definition of that term. Because all four Minnesota cases on public figures were decided before *Gertz,* total reliance on these cases would be misguided. The *Butts* test of limited public figures, used by the Minnesota court in its decisions, has been refined by *Gertz* and *Firestone.* Mere notoriety or involvement in public issues is insufficient to make the plaintiff a limited public figure. Rather, there must be a close nexus between the content of the defamation and such involvement.[160] Moreover, the Minnesota court in *Standke* used the *Rosenbloom* test, which required proof of actual malice if the private individual had been defamed in the discussion of a public issue, but not if he had been defamed in the discussion of a purely personal matter.[161] *Gertz* effectively overruled *Rosenbloom,* and this distinction is no longer required.[162]

2. *Private Individuals*

Determining whether the plaintiff is a private individual is essentially a process of elimination: if the plaintiff is not a public official or a public figure, he is a private individual for the purpose of applying the constitutional limitations set forth in *Gertz.*[163]

The application of *Gertz* is not solely a function of the plaintiff's private status, however. The Court in *Gertz* said that at the very least

155. Beatty v. Ellings, 285 Minn. 293, 301 n.12, 173 N.W.2d 12, 17 n.12 (1969), *cert. denied,* 398 U.S. 904 (1970).

156. 291 Minn. 468, 193 N.W.2d 139 (1971), *cert. dismissed,* 406 U.S. 902 (1972).

157. 385 U.S. 374 (1967).

158. 403 U.S. 29 (1971).

159. 291 Minn. at 474-75, 193 N.W.2d at 144.

160. *See* Gertz v. Robert Welch, Inc., 418 U. S. 323, 351-52 (1974); Comment, *Libel and Slander—A State Is Precluded from Imposing Liability Without Fault or Presumed or Punitive Damages in the Absence of* New York Times *Malice*—Gertz v. Robert Welch, Inc., 6 LOY. U.L.J. 256, 275-76 (1975). *See generally* Robertson, *supra* note 141, at 220-30.

161. *See* 291 Minn. at 475-77, 193 N.W.2d at 144-45.

162. *See* notes 85-98 *supra* and accompanying text.

163. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 351-52 (1974); RESTATEMENT (SECOND) OF TORTS § 580B, comment *a* (1977); Comment, *supra* note 160, at 275-76 (by implication).

its decision applies when the defamatory statement makes "substantial danger to reputation apparent."[164] The opinion leaves unclear, then, the extent to which *Gertz* applies when the content of the statement does not warn of its potential for harm to reputation. Because this issue relates more to the scope of *Gertz* than to the threshold question of whether *Gertz* applies, it is discussed elsewhere in this Note.[165]

C. *Applying the Requirements of* New York Times, Butts, *and* Gertz

The next step in assessing the impact of *New York Times, Butts,* and *Gertz* on a defamation action is to apply the appropriate first amendment requirements. One set of requirements relates to public officials and public figures,[166] the other relates to private individuals.[167] Both sets, however, have an impact on common law defenses.[168]

1. *Public Officials and Public Figures—Applying the* New York Times *and* Butts *Requirement of Proving Actual Malice*

When the United States Supreme Court decided *New York Times,* it cited cases from several states which had already extended the common law privilege of fair comment to false statements.[169] Among the cases cited was *Friedell v. Blakely Printing Co.,*[170] a 1925 Minnesota case. *Friedell* set out the rule that a public official could not recover for defamation unless he proved that the defendant had known the statement was false or otherwise had acted with common law malice.[171] Because of *Friedell,* the decision in *New York Times* did not radically alter Minnesota defamation law. The chief difference is that a defamed public official must now show actual malice to recover,[172] rather than common law malice consisting of ill will or spite.

Butts, on the other hand, did introduce a new concept into Minnesota defamation law by requiring that a public figure prove actual malice to recover.[173] Because Minnesota recognizes no common law privilege to defame a public figure,[174] the impact of *Butts* on Minnesota defamation

164. 418 U.S. at 348 (quoting Curtis Pub. Co. v. Butts, 388 U.S. 130, 155 (1967)).
165. See notes 234-48 *infra* and accompanying text.
166. See notes 169-77 *infra* and accompanying text.
167. See notes 178-267 *infra* and accompanying text.
168. See notes 268-77 *infra* and accompanying text.
169. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 280 n.20 (1964).
170. 163 Minn. 226, 203 N.W. 974 (1925).
171. *Id.* at 230, 203 N.W. at 975.
172. *See* notes 72-80 *supra* and accompanying text.
173. *See* notes 81-84 *supra* and accompanying text.
174. The common law privilege of fair comment encompasses defamatory statements concerning matters of public interest as well as public officials, and therefore there could be a common law privilege to defame a public figure involved in a matter of public interest. *See* RESTATEMENT (SECOND) OF TORTS § 606(2) (Tent. Draft No. 20, 1974); Boyer,

law is substantially greater than *New York Times*.

The actual malice standard set out in *New York Times* and *Butts* requires public officials and public figures to show with convincing clarity[175] that the defendant knew the statement was false or acted in reckless disregard of the truth.[176] The test for reckless disregard is not objective. Rather, it requires a showing that the defendant had actual and subjective doubts as to the truth of the statement.[177]

2. *Private Individuals—Applying the* Gertz *Requirements*

The Court in *Gertz* held that a state may impose liability for the defamation of a private individual upon a showing of some fault.[178] The Court also stated, however, that neither presumed nor punitive damages can be recovered unless the private individual proves that the defendant's fault consists of actual malice.[179] Thus, there are two broad issues to be considered when applying *Gertz* in Minnesota. The first involves the standard of fault that will be required by the Minnesota court.[180] The second involves a private individual's ability to recover presumed and punitive damages.[181]

a. The Standard of Fault

Because *Gertz* allows the states to impose liability for defamation of a private individual upon a showing of the defendant's fault in failing to ascertain the falsity of his statement, the application of *Gertz* in Minnesota will necessarily involve a selection of this fault standard.[182] In addition, however, consideration must also be given to the problems which arise in the application of the fault standard chosen.[183]

i. Selection of the Fault Standard

The United States Supreme Court, in *Firestone*,[184] reiterated its stance in *Gertz* and said it will not take the *Rosenbloom* approach, which required states to look beyond the status of a plaintiff to see

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Fair Comment, 15 OHIO ST. L.J. 280, 283-85 (1954). However, there appear to be no cases in Minnesota which have extended the fair comment privilege to defamation of public figures.

175. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964).
176. *Id.* at 279-80.
177. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).
178. 418 U.S. at 347.
179. *Id.* at 348-51.
180. See notes 182-248 *infra* and accompanying text.
181. See notes 249-67 *infra* and accompanying text.
182. See notes 184-233 *infra* and accompanying text.
183. See notes 234-48 *infra* and accompanying text.
184. 96 S. Ct. 958 (1976).

whether an issue of public or general interest was involved in the defamation. If such an issue was involved, the private individual had to show that the defendant had acted with *New York Times* actual malice.[185]

Because of the latitude permitted by *Gertz*, however, a state may take the *Rosenbloom* approach. But in addition to providing greater protection for public-issue statements, a state must also comply with the *Gertz* requirements of some fault in all other defamations.[186] Four states—Indiana, Colorado, New York, and Arizona—essentially have taken the *Rosenbloom* approach.[187] A threshold question for the Minnesota court, therefore, is whether it too should take the issue-oriented approach similar to that set forth in *Rosenbloom*.

Of the four states, only Indiana based its decision on its own constitution. An Indiana appellate court took the position that a "free interchange of thought and opinion" provision of the state's constitution[188] protects matters of public interest.[189] To effect that protection, the court adopted *Rosenbloom* outright.[190]

Relying in part on the Indiana case, the Supreme Court of Colorado also required that the standard of liability turn on the nature of the issue involved in the defamation.[191] The Colorado decision was based on the court's own view of first amendment guarantees.[192] To avoid the chill and self-censorship that would follow from a negligence standard, the court decided, statements of public interest must be given the special protection of an actual malice standard.[193]

The New York Court of Appeals did not state its reasons for taking an issue-oriented approach.[194] Apparently New York has a history of providing greater protection when a defamation involves public-issue statements.[195]

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185. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971).

186. *See generally* Robertson, *supra* note 141, at 235-45.

187. *See* Peagler v. Phoenix Newspapers, Inc., 26 Ariz. App. 274, 280-81, 547 P.2d 1074, 1081 (1976); Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 98-100, 538 P.2d 450, 457-58 (1975), *cert. denied*, 423 U.S. 1025 (1975); AAFCO Heating & Air Conditioning Co. v. Northwest Pubs., Inc., ___ Ind. App. ___, ___, 321 N.E.2d 580, 585-86 (1974), *cert. denied*, 424 U.S. 913 (1976); Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975). *See* notes 188-98 *infra* and accompanying text.

188. IND. CONST. art. 1, § 9.

189. AAFCO Heating & Air Conditioning Co. v. Northwest Pubs., Inc., ___ Ind. App. ___, ___, 321 N.E.2d 580, 586 (1974), *cert. denied*, 424 U.S. 913 (1976).

190. *Id.*

191. Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 98-100, 538 P.2d 450, 457-58 (1975), *cert. denied*, 423 U.S. 1025 (1975).

192. *Id.* at 99-100, 538 P.2d at 457-58.

193. *Id.* at 99, 538 P.2d at 457-58.

194. Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

195. *See, e.g.*, Garfinkel v. Twenty-First Century Pub. Co., 30 App. Div. 2d 787, 788, 291 N.Y.S.2d 735, 737 (1968) (per curiam); Commercial Programming Unlimited v. CBS

Arizona, prior to *Gertz*, extended a common law privilege to all newspaper publications of public interest.[196] After *Gertz*, the Arizona court concluded that the privilege protects the discussion of public issues.[197] The court decided, therefore, that *New York Times* actual malice or common law malice must be shown when statements of public issues are involved in the defamation.[198]

It seems doubtful that the Minnesota Supreme Court could justify an issue-oriented approach on any of the bases set out by these four courts. The Minnesota court has said that the free speech and press clause of the Minnesota constitution does not afford more protection than the first amendment.[199] Reasoning similar to the Indiana court's should thereby be precluded. Public policy and precedent might provide a rationale, because several Minnesota cases decided before *New York Times* speak broadly of protecting the discussion of public issues.[200] A closer examination of those cases, however, reveals that it is only when the statement is connected with the discussion of public officials or candidates for office that the Minnesota court has focused on the content of the statement. Although it may be argued on the basis of such cases that Minnesota public policy protects the discussion of public issues, the court may well look upon those decisions as absorbed by *New York Times*.

The Minnesota case of *Standke v. B.E. Darby & Sons*[201] also might support the adoption of an issue-oriented approach. *Standke*, decided six months after *Rosenbloom*,[202] raised the question of whether grand jurors are "public officials" within the meaning of *New York Times*. The

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Inc., 81 Misc. 2d 678, 686-88, 367 N.Y.S.2d 986, 994-96 (Sup. Ct. 1975), *rev'd on other grounds*, 50 App. Div. 2d 351, 378 N.Y.S.2d 69 (1975); Lloyds v. UPI, Inc., 63 Misc. 2d 421, 423-24, 311 N.Y.S.2d 373, 376 (Sup. Ct. 1970); Cohen v. New York Herald Tribune, Inc., 63 Misc. 2d 87, 91-92, 310 N.Y.S.2d 709, 714-15 (Sup. Ct. 1970).

196. Phoenix Newspapers, Inc. v. Choisser, 82 Ariz. 271, 276-77, 312 P.2d 150, 154 (1957); Broking v. Phoenix Newspapers, Inc., 76 Ariz. 334, 346, 264 P.2d 413, 417 (1953).

197. Peagler v. Phoenix Newspapers, Inc., 26 Ariz. App. 274, 279-81, 547 P.2d 1074, 1079-81 (1976).

198. *Id.* at 281, 547 P.2d at 1081.

199. *See* Dayton Co. v. Carpet, Linoleum & Resilient Floor Decorators Local 596, 229 Minn. 87, 99-112, 39 N.W.2d 183, 190-97 (1949), *appeal dismissed*, 339 U.S. 906 (1950); *cf., e.g.*, Anderson v. City of St. Paul, 226 Minn. 186, 190, 32 N.W.2d 538, 541 (1948) (state due process clause not intended to be more restrictive than federal due process clause); State v. Northwest Airlines, Inc., 213 Minn. 395, 398-99, 7 N.W.2d 691, 694 (1942) (same), *aff'd*, 322 U.S. 292 (1944).

200. *See, e.g.*, Friedell v. Blakely Printing Co., 163 Minn. 226, 229-30, 203 N.W. 974, 975 (1925); Herringer v. Ingberg, 91 Minn. 71, 76-77, 97 N.W. 460, 463 (1903); Marks v. Baker, 28 Minn. 162, 165, 9 N.W. 678, 680 (1881).

201. 291 Minn. 468, 193 N.W.2d 139 (1971).

202. *Compare* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 29 (1971) (decided June 7, 1971) *with* Standke v. B.E. Darby & Sons, 291 Minn. 468, 468, 193 N.W.2d 139, 139 (1971) (decided December 3, 1971).

court took a broad view of the *New York Times* requirements and stated that "in view of the public interest in the performance of functions delegated by law to the grand jury, the interests of free and open discussion demand that grand jurors in this case must be considered public officials or figures."[203] Even if grand jurors are deemed private individuals, the court said, *Rosenbloom* requires the application of the actual malice standard because the activities of a grand jury are matters of public or general concern.[204] The court viewed the *Rosenbloom* development as a logical outgrowth of *New York Times* that "has been emerging for some time and to some degree has been intertwined in *New York Times*."[205]

There are indications, however, that the court in *Standke* gave special protection to matters of public interest only because it felt compelled to do so by *Rosenbloom*. The Minnesota court admitted that it was reluctant to find that grand jurors are public officials, because they neither seek their public status nor have easy access to the media.[206] Implicit in this reluctance may be the court's conviction that private individuals should not be compelled to prove the stringent *New York Times* actual malice standard.

Once the question of whether to take an issue-oriented approach has been decided, the next question confronting the Minnesota court is what standard or standards of liability should be adopted. The standards range from *New York Times* actual malice to negligence.

A standard of fault greater than negligence has been adopted only in those states taking the issue-oriented approach, where special protection is given to statements involving public issues.[207] Three of the four states that have taken the issue-oriented approach have adopted some form of malice standard to be applied whenever an issue of public interest is involved in the defamation.[208] Presumably these states are reserving the negligence standard for private-issue defamations.

Of these three states, Indiana and Colorado decided that *New York Times* actual malice will be required whenever the defamation of a private individual concerns an issue of public interest.[209] Both courts

203. 291 Minn. at 471, 193 N.W.2d at 142.

204. *Id.* at 475-77, 193 N.W.2d at 144-45.

205. *Id.* at 476, 193 N.W.2d at 145.

206. *Id.* at 471-72, 193 N.W.2d at 142.

207. *Compare* cases cited note 187, *supra, with* cases cited notes 218-19 *infra.*

208. *See* Peagler v. Phoenix Newspapers, Inc., 26 Ariz. App. 274, 281, 547 P.2d 1074, 1081 (1976); Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 98-99, 538 P.2d 450, 457 (1975), *cert. denied,* 423 U.S. 1025 (1975); AAFCO Heating & Air Conditioning Co. v. Northwest Pubs., Inc., ___ Ind. App. ___, ___, 321 N.E.2d 580, 586 (1974), *cert. denied,* 424 U.S. 913 (1976).

209. *See* Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 98-99, 538 P.2d 450, 457 (1975), *cert. denied,* 423 U.S. 1025 (1975); AAFCO Heating & Air Conditioning Co. v.

decided that a vague negligence standard is inadequate to protect free speech and that self-censorship would result from applying a negligence standard.[210]

The Arizona court, on the other hand, thought that convincing and strong arguments can be made for either a negligence or a malice standard when private individuals are involved.[211] The court decided, however, to follow precedent set forth in Arizona decisions prior to *Gertz* which applied a malice standard to cases involving newspaper publications.[212] Thus, Arizona requires a showing of either *New York Times* actual malice or common law malice when a private individual involved with a public issue has been defamed by the media.[213]

New York, the fourth state to take an issue-oriented approach, has adopted a gross negligence standard rather than a malice standard.[214] The New York court concluded that the Court in *Gertz* was reacting to the *Rosenbloom* effect of protecting defendants too much and plaintiffs too little.[215] The court decided, therefore, that something less than a malice standard should be applied.[216] New York conditions recovery upon proof that "the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."[217]

Since *Gertz*, negligence standards have been applied in cases in eleven states[218] and in one federal court.[219] Although the majority opinion

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Northwest Pubs., Inc., ___ Ind. App. ___, ___, 321 N.E.2d 580, 586 (1974), *cert. denied*, 424 U.S. 913 (1976).

210. Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 99-100, 538 P.2d 450, 457-58 (1975), *cert. denied*, 423 U.S. 1025 (1975); AAFCO Heating & Air Conditioning Co. v. Northwest Pubs., Inc., ___ Ind. App. ___, ___, 321 N.E.2d 580, 588-90 (1974), *cert. denied*, 424 U.S. 913 (1976).

211. *See* Peagler v. Phoenix Newspapers, Inc., 26 Ariz. App. 274, 280-81, 547 P.2d 1074, 1081 (1976).

212. *Id.* at 279-81, 547 P.2d at 1079-81.

213. *Id.* at 281, 547 P.2d at 1081.

214. *See* Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

215. *Id.* at 198-99, 341 N.E.2d at 571, 379 N.Y.S.2d at 63-64.

216. *Id.* at 99, 341 N.E.2d at 571, 379 N.Y.S.2d at 64.

217. *Id.*

218. *See* Firestone v. Time, Inc., 305 So. 2d 172, 178 (Fla. 1974) (per curiam), *vacated*, 96 Sup. Ct. 958 (1976); Cahill v. Hawaiian Paradise Park Corp., ___ Hawaii ___, ___, 543 P.2d 1356, 1362-67 (1975); Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975); Gobin v. Globe Pub. Co., 216 Kan. 223, 230-34, 531 P.2d 76, 82-84 (1975); Wilson v. Capital City Press, 315 So. 2d 393 (La. Ct. App.), *cert. denied*, 320 So. 2d 203 (La. 1975); Jacron Sales Co. v. Sindorf, 276 Md. 580, 594-97, 350 A.2d 688, 696-98 (1976); Stone v. Essex County Newspapers, Inc., ___ Mass. ___, ___, 330 N.E.2d 161, 168 (1975); Walters v. Sanford Herald, Inc., ___ N.C. App. ___, 228 S.E.2d 766 (1976); Martin v. Griffin Television, Inc., 549 P.2d 85, 90-92 (Okla. 1976); Thomas H. Maloney & Sons v. E.W. Scripps Co., 43 Ohio App. 2d 105, 110, 334 N.E.2d 494, 498 (1974), *cert. denied*, 423

in *Gertz* did not suggest a standard, it is clear that a negligence standard was contemplated.[220] Most of the twelve opinions, therefore, do not set out their reasons for applying a negligence standard. Rather, the courts have assumed that a negligence standard accomplishes the result required by *Gertz*.

Three of the eleven states clearly based their adoption of a negligence standard on state constitutions. The Illinois court looked to a provision of the Illinois constitution that recognizes an interest in reputation.[221] The Oklahoma[222] and Kansas[223] courts relied on language in state constitutions that makes individuals responsible for abusing the right to speak and write freely.

Only the Hawaii court has dealt in depth with its reasons for adopting a negligence standard. A major reason was that Hawaii case law since 1970 has required private individuals to show negligence.[224] The court also rejected the reasons that other courts had used in adopting a malice standard. The Hawaii court thus refused to give the free speech and press clause of the Hawaii constitution a broader meaning than the first amendment, refused to find that a negligence standard results in undue self-censorship, and refused to give defendants more protection than *Gertz* requires merely because a public issue may be involved.[225]

It is not clear whether the Minnesota court will adopt a standard of malice, of recklessness, or of negligence. Although no state yet has responded to *Gertz* by adopting a malice or gross negligence standard in lieu of its common law strict liability, such a response would simplify Minnesota defamation law by eliminating a negligence standard. For example, adoption of an actual malice standard would do away with the necessity of distinguishing public from private plaintiffs and the attendant confusion over recoverable damages.[226] Moreover, the Minnesota

U.S. 883 (1975); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 817-20 (Tex. 1976), *cert. denied*, 45 U.S.L.W. 3573 (U.S. Feb. 22, 1977) (No. 76-926).

219. *See* Drotzmanns, Inc. v. McGraw-Hill, Inc., 500 F.2d 830, 832-33 (8th Cir. 1974) (applying South Dakota law).

220. Justice Powell, writing for the majority in *Gertz*, mentioned negligence only in the context of damages recoverable in the absence of actual malice. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). The dissenting opinions assumed that a negligence standard would be widely adopted. Chief Justice Burger dissented because he did not know "the parameters of a 'negligence' doctrine as applied to the news media." *Id.* at 355. Justice Brennan's dissent was based on his objection to the uncertainty and self-censorship effects of a reasonable care standard. *See id.* at 366.

221. Troman v. Wood, 62 Ill. 2d 173, 194-95, 340 N.E.2d 292, 297 (1975).

222. Martin v. Griffin Television, Inc., 549 P.2d 85, 92 (Okla. 1976).

223. Gobin v. Globe Pub. Co., 216 Kan. 223, 232, 531 P.2d 76, 83 (1975).

224. *See* Cahill v. Hawaiian Paradise Park Corp., ___ Hawaii ___, ___, 543 P.2d 1356, 1364 (1975).

225. *Id.* at ___, 543 P.2d at 1364-66.

226. *See* notes 249-67 *infra* and accompanying text.

court might adopt a malice or recklessness standard if it favors a broad policy of protecting freedom of speech and press.

Arguments supporting the adoption of a negligence standard in Minnesota are no less persuasive. Negligence has been an active part of Minnesota defamation law since 1889, when the court first interpreted the retraction statute. That statute provides, among other things, that a plaintiff's damages are limited to special damages if a newspaper publisher can show that he acted in "good faith" and under a mistake of fact in printing the libel.[227] The court held in *Allen v. Pioneer-Press Co.*[228] that "good faith" means an absence of negligence. The court viewed the retraction statute as imposing on the publisher a duty of taking all reasonable precautions to prevent untrue and injurious publications about others.[229] Care is measured by the honest belief of a reasonable person under like circumstances.[230] Factors to be considered in determining negligence include the nature of the defamatory statement, the reputation of the plaintiff, the extent to which the statement has already been publicized, the extent of legitimate public interest in the statement, and the extent to which "hot" news is involved.[231]

Apart from the retraction statute, the passage of the broadcaster's statute in 1951 supports the argument that a negligence standard should be adopted.[232] The broadcaster's statute provides that the owner or operator of a broadcasting station is not liable for defamations spoken by someone other than an agent or employee of the station, unless the owner or operator failed to exercise due care in preventing publication of the statement.[233]

Both the retraction and broadcaster's statutes apparently reflect a legislative determination, furthered by judicial construction, that a negligence standard adequately protects freedom of speech and press. In view of the United States Supreme Court's decision in *Gertz* that negligence affords sufficient first amendment protection to defendants, and in view of existing Minnesota law, it appears that the most consistent course open to the Minnesota court is adoption of a negligence standard rather than a standard of malice or recklessness. A private individual,

227. MINN. STAT. § 548.06 (1976).

228. 40 Minn. 117, 125-26, 41 N.W. 936, 939 (1889); *accord,* Thorson v. Albert Lea Pub. Co., 190 Minn. 200, 206-07, 251 N.W. 177, 180 (1933); Gray v. Times Newspaper Co., 74 Minn. 452, 457-58, 77 N.W. 204, 206 (1898).

229. *See* Allen v. Pioneer-Press Co., 40 Minn. 117, 125-26, 41 N.W. 936, 939 (1889).

230. Thorson v. Albert Lea Pub. Co., 190 Minn. 200, 206-07, 251 N.W. 177, 180 (1933); Gray v. Times Newspaper Co., 74 Minn. 452, 457-58, 77 N.W. 204, 206 (1898); Allen v. Pioneer-Press Co., 40 Minn. 117, 125-26, 41 N.W. 936, 939 (1889).

231. Allen v. Pioneer-Press Co., 40 Minn. 117, 126, 41 N.W. 936, 939 (1889).

232. Act of Apr. 20, 1951, ch. 532, 1951 Minn. Laws 800.

233. MINN. STAT. § 544.043 (1976).

then, would be entitled to recover for defamation upon a showing of the defendant's negligence.

ii. Application of the Gertz *Requirement of Fault—Scope of the Fault Requirement*

The holding in *Gertz* allows the states to impose liability upon a showing of "fault."[234] Clearly the Court was referring to the defendant's fault in failing to ascertain the falsity of the statement.[235] But a defendant can be at fault with regard to each of the elements of a defamation action. That is, he can negligently refer to the plaintiff; he can negligently communicate the statement to a third party; he can negligently fail to ascertain that his statement was false; and he can negligently fail to realize the defamatory potential of the statement.[236] It is not clear from *Gertz* whether the plaintiff must show fault with regard to each of these four elements or only with regard to the element of falsity.

Under Minnesota law, the question of whether *Gertz* requires fault in referring to the plaintiff is purely academic. The Minnesota common law requirement of fault in referring to the plaintiff is stricter than the constitutional minimum. *Gertz* would require only negligence in this regard, whereas Minnesota law requires intention.[237] Similarly, Minnesota common law already imposes a fault requirement with regard to the element of publication to a third party.[238]

Whether *Gertz* requires fault in failing to realize the defamatory potential is a problematical question, although the Court supplied some guidance for its resolution. The Court indicated that the holding of *Gertz* applies to a defamation case "at least" where the substance of the defamatory statement "makes substantial danger to reputation apparent."[239] The Court went on to say: "Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential."[240]

This language indicates that a state may allow a private individual to recover upon a showing of the defendant's negligent failure to ascertain the truth whenever a prudent editor would have realized the defam-

234. 418 U.S. at 347.

235. *Id.* at 325-32 (certiorari granted to reconsider issue of whether plaintiff had to prove the defendant's knowledge of falsity or reckless disregard of the truth).

236. *See* notes 13-31, 53-54 *supra* and accompanying text.

237. Clare v. Farrell, 70 F. Supp. 276, 278-79 (D. Minn. 1947); Knox v. Meehan, 64 Minn. 280, 66 N.W. 1149 (1896); Dressel v. Shipman, 57 Minn. 23, 58 N.W. 684 (1894).

238. *See* Olson v. Molland, 181 Minn. 364, 232 N.W. 625 (1930); Kramer v. Perkins, 102 Minn. 455, 456-59, 113 N.W. 1062, 1063-64 (1907) (semble).

239. 418 U.S. at 348.

240. *Id.*

atory potential of the statement. But for situations in which a prudent editor would not have realized the defamatory potential of the statement, *Gertz* gives little guidance. The Court stated that *Gertz* did not present this situation and that it would "intimate no view as to its proper resolution."[241] Until the Court resolves this question, the states are left with two broad alternatives: either they may impose liability, even though the defendant was not at fault in failing to realize the defamatory potential of the statement; or they may refuse to impose liability in this situation.

Under the first broad alternative, a court imposing liability must decide what standard of liability—actual malice, negligence, or even strict liability—will be applied to the element of falsity. Some support for applying an actual malice standard to the element of falsity is found in *Gertz* itself. In limiting its holding to statements which reasonably warn of their defamatory potential, the Court cited *Time, Inc. v. Hill.*[242] In *Hill,* a privacy action, the Court applied an actual malice standard and indicated that a negligence standard is inadequate when the content of the statement does not warn of its potential for harm.[243] Applying an actual malice standard to the element of falsity, then, gives effect to the *Hill* dicta.[244]

By contrast, a state applying a negligence standard or imposing strict liability would ignore the Court's reference to *Hill* and rely instead on the Court's language that it was intimating no view on the resolution of this question. It seems doubtful, however, that the Court meant that a state could revert to its common law of strict liability and impose liability when the defendant was not at fault in failing to ascertain the truth of his statement.[245] In view of the Court's reference to *Hill,* it also seems doubtful that the Court meant that a state could impose liability for mere negligence in regard to the element of falsity. The imposition of liability on either of these bases, therefore, finds little support in the authorities, who treat the bases more as theoretical, than as practical, solutions to the problem.[246]

Under the second broad alternative, a state would refuse to impose liability once it had been determined that the defendant did not know

241. *Id.*

242. 385 U.S. 374 (1967).

243. *Id.* at 389.

244. Justice White, dissenting in *Gertz,* stated: "If I read the Court correctly, it clearly implies that for those publications that do not make 'substantial danger to reputation apparent,' the *New York Times* actual-malice standard will apply." 418 U.S. at 389 n.27. At least one authority has agreed that this is the effect of the limitation. Frakt, *The Evolving Law of Defamation:* New York Times Co. v. Sullivan *to* Gertz v. Robert Welch, Inc. *and Beyond,* 6 RUT.-CAM. L.J. 471, 506 (1975).

245. RESTATEMENT (SECOND) OF TORTS § 580B, comment *c* (1977).

246. *Id.*; Anderson, *Libel and Press Self-Censorship,* 53 TEX. L. REV. 422, 463-64 (1975).

and could not have known of the defamatory potential of the statement. The practical effect of this alternative is to require negligence in regard to both the element of falsity and the element of defamatory potential. Hence, a plaintiff could not recover even if the defendant knew the statement was false but did not know, and could not have known, of the defamatory potential of the statement. Most authorities have taken the position that this alternative provides the soundest solution to the problem.[247]

The position which the Minnesota Supreme Court will take on this problem is not clear. In the past the court has treated with little sympathy those statements which are not clearly defamatory.[248] Most statements which would not warn a prudent editor are also statements which are not clearly defamatory. It is possible, therefore, that the court's past position on statements not clearly defamatory might be carried over either to deny recovery or to impose an actual malice standard whenever the defendant was not negligent in failing to realize the defamatory potential of the statement.

b. Damages

Gertz limits the damages recoverable to damages for actual injury, unless actual malice is shown.[249] "Actual injury," the Court said, means "actual harm inflicted by defamatory falsehood," including the "more customary types . . . [such as] impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[250] Although actual injury must be proven, this definition encompasses both the kind of harm for which the common law allows recovery of special damages[251] and the kind of harm for which it allows recovery of general damages.[252] To prove actual injury, evidence assigning a dollar

247. *See* RESTATEMENT (SECOND) OF TORTS § 580B, comment *c* (1977); Anderson, *supra* note 246, at 463-64; Robertson, *supra* note 141, at 244.

248. For example, the requirement that extrinsic facts be pleaded when the statement is not clearly defamatory has been vigorously followed. In Ten Broeck v. Journal Printing Co., 166 Minn. 173, 207 N.W. 497 (1926), a newspaper story suggested that the plaintiff's house may have been a house of prostitution and a hospital for abortions. But the court held that it was not libel per se and was not actionable without pleading extrinsic facts to establish the defamatory meaning.

Similarly, the court has sometimes been reluctant to find that a particular oral defamation constitutes slander per se. Thus, in Gaare v. Melbostad, 186 Minn. 96, 242 N.W. 466 (1932), the court held that it was not a disparagement of profession to say a banker is "crooked." To the same effect is Schnobrich v. Venske, 146 Minn. 21, 177 N.W. 778 (1920), in which the court held that accusations of poor bookkeeping by a school treasurer did not impute harm to the treasurer's profession as banker.

249. 418 U.S. at 348-50.

250. *Id.* at 350.

251. *See* note 32 *supra* and accompanying text.

252. *See* note 35 *supra* and accompanying text.

value to the injury is unnecessary, but there must be evidence to support the award.[253]

If the Minnesota court responds to *Gertz* by selecting an actual malice standard for private individual cases, the *Gertz* damage limitations will have no effect. If the court selects a negligence standard, however, damages cannot be presumed in slander per se and libel cases[254] unless the private plaintiff shows actual malice. If the Minnesota retraction statute applies, presumed damages are not recoverable against a newspaper, even upon a showing of actual malice, unless a retraction has been demanded.[255]

In cases where special pecuniary damage is a common law requirement of actionability,[256] this requirement must still be met.[257] But even if this requirement is met, additional damages which would then be presumed under the common law cannot be recovered unless the private individual also proves actual malice.[258]

If the private individual cannot prove actual malice to obtain presumed damages, he may nevertheless recover damages for the types of harm which are encompassed by presumed damages, to the extent that he can actually prove such harm.[259]

To avoid the self-censorship that follows from large damage awards, *Gertz* also limits punitive damages to cases where actual malice can be proven.[260] Under the Minnesota common law of defamation, punitive damages can be recovered if common law malice is shown by evidence of the defendant's bad faith, ill will, or spite.[261] Because *Gertz* requires

253. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

254. See notes 38-49 *supra* and accompanying text.

255. *See* MINN. STAT. § 548.06 (1976).

256. See note 42 *supra* and accompanying text.

257. Sauerhoff v. Hearst Corp., 388 F. Supp. 117, 118-24 (D. Md. 1974), *vacated and remanded*, 538 F.2d 588 (4th Cir. 1976) (district court erred in finding a defamation per quod rather than a defamation per se); *see* Comment, *supra* note 160, at 278 *(Gertz* did not address the common law rule which requires special pecuniary damage as a threshold of actionability). *But see* Frakt, *supra* note 244, at 504-05 (in view of the *Gertz* requirements, complex jury instructions would be avoided if special damages were no longer a threshold of actionability for slanders).

258. Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-50 (1974). *See generally* Anderson, *supra* note 246, at 473-75.

259. Lawlor v. Gallagher Presidents' Report, Inc., 394 F. Supp. 721, 733-35 (S.D.N.Y. 1975), *remanded mem.*, 538 F.2d 311 (2d Cir. 1976); *see* Sauerhoff v. Hearst Corp., 538 F.2d 588, 591-92 (4th Cir. 1976). *See also* Robertson, *supra* note 141, at 230-34 (discussion of cases which have addressed the issue of proving actual injury).

260. Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-50 (1974).

261. Hammersten v. Reiling, 262 Minn. 200, 209, 115 N.W.2d 259, 265-66 (court using term "actual malice" to describe common law malice, not *New York Times* malice), *cert. denied*, 371 U.S. 862 (1962); McCuskey v. Kuhlmann, 147 Minn. 460, 461, 179 N.W. 1000, 1000 (1920) (same); MacInnis v. National Herald Printing Co., 140 Minn. 171, 175, 167 N.W. 550, 551 (1918) (same).

a showing of actual malice, common law malice is no longer sufficient if it consists of something other than knowledge of falsity or reckless disregard of the truth.

Some states have never allowed punitive damages in a defamation action,[262] or have allowed them only on a very limited basis.[263] At least one federal court has recently discarded punitive damages, reasoning that their effect is to suppress unpopular speech.[264] It seems doubtful that the Minnesota court will take that course. Historically, punitive damage awards for defamation have not been large in the Minnesota courts.[265] The size of an award seldom has occasioned reversal, and remittitur has had to be used sparingly.[266] Furthermore, the Minnesota Supreme Court has recently reiterated the proposition that punitive damages are proper in a defamation action.[267]

3. *Impact of* New York Times, Butts, *and* Gertz *on Common Law Defenses*

It is clear from the holdings of *New York Times, Butts,* and *Gertz* that a plaintiff must now prove either actual malice or some fault on the part of the defendant. But the impact of these holdings on a defendant's case is less explicit. In particular, the three cases raise questions concerning

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262. *See* Stone v. Essex County Newspapers, Inc., ___ Mass. ___, ___, 330 N.E.2d 161, 169 (1975); Farrar v. Tribune Pub. Co., 57 Wash. 2d 549, 552-53, 358 P.2d 792,794-95 (1961) (en banc).

263. *See* Barton v. Barnett, 226 F. Supp. 375, 379 (N.D. Miss. 1964) (punitive damages not recoverable for libel per quod unless actual damages are proved); Proto v. Bridgeport Herald Corp., 136 Conn. 557, 571, 72 A.2d 820, 828 (1950) (punitive damages limited to plaintiff's costs of litigation less taxable costs); Wabash Printing & Pub. Co. v. Crumrine, 123 Ind. 89, 93, 21 N.E. 904, 905 (1889) (punitive damages not recoverable if defendant is subject to criminal prosecution for libel).

264. *See* Maheu v. Hughes Tool Co., 384 F. Supp. 166 (C.D. Cal. 1974) (California statute which provides for recovery of punitive damages is unconstitutional), *noted in* 28 VAND. L. REV. 887 (1975).

265. *See* Hammersten v. Reiling, 262 Minn. 200, 209, 115 N.W.2d 259, 265-66 ($7500; the largest award of punitive damages appealed to the Minnesota Supreme Court), *cert. denied,* 371 U.S. 862 (1962); Loftsgaarden v. Reiling, 267 Minn. 181, 126 N.W.2d 154 ($5000; the second largest award of punitive damages appealed to the Minnesota Supreme Court), *cert. denied,* 379 U.S. 845 (1964).

266. *See* Roemer v. Jacob Schmidt Brewing Co., 132 Minn. 399, 404, 157 N.W. 640, 642 (1916) (excessiveness of punitive damages unclear from court's holding); Peterson v. Western Union Tel. Co., 75 Minn. 368, 77 N.W. 985 (1899) (remittitur; $2000 reduced to $1000); Fredrickson v. Johnson, 60 Minn. 337, 341-44, 62 N.W. 388, 389-90 (1895) (remittitur; $5000 reduced to $3000). *See also* Gray v. Times Newspaper Co., 78 Minn. 323, 81 N.W. 7 (1899) (trial court did not abuse discretion by setting aside excessive verdict in defamation action).

267. *See* Wild v. Rarig, 302 Minn. 419, 447, 234 N.W.2d 775, 793 (1975) (per curiam) (dictum), *cert. denied,* 425 U.S. 945 (1976). *See also* Loftsgaarden v. Reiling, 267 Minn. 181, 126 N.W.2d 154 (punitive damages, because of their deterrent and punishment value, can be recovered even in the absence of actual damages), *cert. denied,* 379 U.S. 845 (1964).

the affirmative defense of truth and the viability of common law defenses.

Truth is an affirmative defense under the common law.[268] This defense may now be outmoded. If the plaintiff is a public official or public figure, he must prove the defendant had knowledge of the statement's falsity or had actual, subjective doubts about its truth. The Minnesota court has said that this requirement also imposes a duty upon the public official or public figure to prove the statement was false.[269] The defendant's burden of proving truth has thus been transformed into the public plaintiff's burden of proving falsity.

The effect of *Gertz* on the affirmative defense of truth presents a more difficult question. The *Restatement* suggests that the defense of truth is outmoded after *Gertz* because the private individual's burden of showing negligent failure to ascertain the truth necessitates, as a practical matter, a showing of the statement's falsity.[270] Whether the Minnesota court will follow the *Restatement's* suggestion is an open question. No clear trend has developed in other states.[271] Although the *Restatement's* suggestion has merit, there may be good reasons for not heeding it. The *Restatement* analysis may not hold true in every case, because a plaintiff may be able to prove the defendant's negligence merely by showing a failure to investigate or reliance upon questionable sources.[272] This would not necessarily entail proof of falsity. Furthermore, the common law rule that truth is an affirmative defense protects the plaintiff's privacy. The court might reason that a defamed plaintiff, who already feels injury to his reputation, should not be compelled to reveal private facts in order to vindicate his reputation.[273]

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268. *E.g.*, Hrdlicka v. Warner, 144 Minn. 277, 278-79, 175 N.W. 299, 299-300 (1919); Wilcox v. Moore, 69 Minn. 49, 52, 71 N.W. 917, 918-19 (1897).

269. Beatty v. Ellings, 285 Minn. 293, 301-02, 173 N.W.2d 12, 17-18 (1969), *cert. denied*, 398 U.S. 904 (1970). This rule apparently carries over from the common law rule that the burden of proving truth was on the plaintiff once a common law privilege was raised as a defense. *See, e.g.*, Clancy v. Daily News Corp., 202 Minn. 1, 10, 277 N.W. 264, 269 (1938); Peterson v. Steenerson, 113 Minn. 87, 90, 129 N.W. 147, 148 (1910).

270. RESTATEMENT (SECOND) OF TORTS § 580B, comment *i* (1977).

271. *Compare, e.g.*, Jacron Sales Co. v. Sindorf, 276 Md. 580, 597, 350 A.2d 688, 698 (1976) (adopting the *Restatement* rule) *with, e.g.*, Lowenschuss v. West Pub. Co., 542 F.2d 180, 184 (3d Cir. 1976) (by implication) (truth remains an affirmative defense).

272. In Curtis Pub. Co. v. Butts, 388 U.S. 130, 156-58 (1967), the Court specifically pointed to inadequate investigation and reliance upon questionable sources as evidence which was sufficient to show the publisher's recklessness.

273. This conclusion is supported by the Court's recent decision of Time, Inc. v. Firestone, 96 S. Ct. 958 (1976), in which defendant *Time* magazine argued that it had an absolute privilege to publish a report of judicial proceedings involving private aspects of plaintiff's divorce litigation. The Court rejected the argument, stating:

> while participants in some litigation may be legitimate "public figures," either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will

The common law privileges continue to provide a defense in a defamation action. Unlike the constitutional protections, which can be defeated by actual malice or fault, absolute privileges cannot be defeated.[274] The qualified privileges will not, however, afford any additional protection if the plaintiff is a public official or public figure. Because the public plaintiff must prove actual malice as a constitutional requirement to recovery, this proof encompasses common law malice and defeats the qualified privilege.[275]

On the other hand, if the plaintiff is a private individual, the qualified privilege will afford more protection than the Constitution in those states which have responded to *Gertz* by adopting a negligence standard of fault. In Minnesota, mere negligence is not common law malice and therefore will not defeat the qualified privilege.[276] Because *Gertz* leaves the qualified privileges untouched,[277] if a defendant has a qualified privilege in a private individual action, he should raise it as a defense.

V. Conclusion

Decisions of the United States Supreme Court since 1964 have had a significant effect on defamation law. First amendment requirements have modified the common law by replacing the strict liability of a defamation action with fault standards linked to the public or private status of the plaintiff.

In many states, the requirements have meant substantial changes in defamation law. In Minnesota, the impact of the decision in *New York Times* was not significant because Minnesota had adopted, decades before, a rule giving special protection to criticism of public officials.

> in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others. There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom.

Id. at 966-67.

274. *See* notes 56-57 *supra* and accompanying text.

275. *See* notes 58-61 *supra* and accompanying text.

276. *See* note 61 *supra* and accompanying text.

277. *See, e.g.*, Tendler v. Dun & Bradstreet, Inc., 43 Cal. App. 3d 788, 118 Cal. Rptr. 274 (1974); Jacron Sales Co. v. Sindorf, 276 Md. 580, 597-601, 350 A.2d 688, 698-700 (1976); Barbetta Agency, Inc. v. Evening News Pub. Co., 135 N.J. Super. 214, 343 A.2d 105 (App. Div. 1975); Hahn v. Kotten, 43 Ohio St. 2d 237, 331 N.E.2d 713 (1975) (by implication); Calero v. Del Chemical Corp., 68 Wis. 2d 487, 498-504, 228 N.W.2d 737, 743-47 (1975).

As recently as 1975, the Minnesota court differentiated constitutional protections from common law privileges. In McBride v. Sears, Roebuck & Co., ___ Minn. ___, ___, 235 N.W.2d 371, 374-75 & n.1 (1975), the court reiterated the rules governing the common law privileges and distinguished express or actual malice in the context of common law privileges from actual malice in the context of constitutional protections afforded by *New York Times* and *Butts*.

Similarly, if the Minnesota Supreme Court responds to *Gertz* by adopting a negligence standard, novel concepts will not be introduced into Minnesota defamation law because of case law applying a negligence standard under the retraction statute.

Gertz cuts back on the constitutional protection afforded to public-issue statements and leaves to the states the task of deciding the role of public-issue statements in their defamation law. This is, perhaps, the most significant decision the Minnesota Supreme Court will have to make when it selects a standard of fault because every state that affords special protection to public-issue statements necessarily selects a standard of fault involving greater culpability than negligence. The Minnesota court may decide that public-issue statements will not be protected adequately by a negligence standard even though the cases construing the Minnesota retraction statute indicate that the public nature of the statement is a factor in determining negligence. Alternatively, the court may decide that *New York Times* and *Butts* adequately protect the discussion of public issues because "public official" and "public figure" are defined largely in terms of the individual's involvement in issues of public controversy or importance. Once this decision is made by the Minnesota court, the application of *New York Times, Butts*, and *Gertz* can be ascertained more precisely.